UT 08-2
Tax Type: Use Tax
Issue: Private Vehicle Use Tax - Nonresident

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	**No. 07 ST 0000** **MV no. 000000000** **NTL: 00 0000000000000**
v.	
John Doe	**Mimi Brin** **Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. John R. Winters, Jr. of Winters Enright Salzetta & O'Brien LLC for John Doe; Mr. John Alshuler, Special Assistant Attorney General, on behalf of the Illinois Department of Revenue

Synopsis:

This matter comes on for hearing pursuant to the grant of a late discretionary hearing to John Doe (hereinafter "Doe" or the "Taxpayer") based upon Notice of Tax Liability number 00 0000000000000 (hereinafter "NTL") issued by the Illinois Department of Revenue (hereinafter the "Department") for Motor Vehicle Use Tax for Doe's purchase, in Illinois in 2003, of a 2001 Mercedes S-430 motor vehicle (hereinafter "motor vehicle" or "Mercedes"). Doe did not pay any use tax to Illinois on this purchase based upon his position that he was not an Illinois resident at that time, and, therefore,

was exempt from the payment of any such tax. At the hearing held in this matter, Doe testified and documentary evidence was offered for each party. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Department. In support of this recommendation, I make the following findings of facts and conclusions of law:

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Notice of Tax Liability number 00 0000000000000, dated December 5, 2006, showing a tax liability of $3,338.00 with additional penalty and interest calculated through December 5, 2006. Department Ex. No. 1
2. On July 21, 2003, Doe purchased a 2001 Mercedes S-430 motor vehicle from Motor Werks of Barrington, Inc., an Illinois retailer. Department Ex. No. 2 (ST-556 Sales Tax Transaction Return signed by John Doe and Theresa A. Doe)
3. At the time of purchase, taxpayer represented his address as Anywhere, Arizona. Id.
4. At the time of the purchase, Doe rented and lived in an apartment at Anywhere, Illinois, where he continued to have an apartment until at least April 25, 2007. Transcript ("Tr.") pp. 10 (referencing Power of Attorney filed in this cause with the Department), 28-9 (Doe), 34 (Doe), 40 (Doe),

Department Exs. No. 4 (Doe 2004 1040, IL-1040), 6 (Doe 2005 1040, IL-1040)

5. The motor vehicle was delivered to Doe on or about September 21, 2003. Taxpayer Ex. No. 2 (Vehicle Buyer's Order dated 9/21/03)

6. Motor Werks of Barrington, Inc. issued a temporary registration plate, #0000000, to Doe for the Mercedes on October 2, 2003. Taxpayer Ex. No. 3 (Temporary Registration Plate Customer Copy)

7. At all pertinent times, Doe had an Illinois driver's license. Tr. p. 27 (Doe)

8. On October 14, 2003 Doe applied for Arizona title and registration for the motor vehicle. Taxpayer Ex. No. 4 (Arizona Department of Transportation Motor Vehicle Division Title and Registration Application). The Arizona Certificate of Title for the motor vehicle was issued to Doe on October 14, 2003. Taxpayer Ex. No. 5 (Arizona Certificate of Title)

9. The application has the address for Doe as Anywhere, AZ. Taxpayer Ex. No. 4

10. The Certificate of Title shows an address for Jane Doe as Anywhere, AZ. Taxpayer Ex. No. 5

11. Taxpayer paid monies to the state of Arizona at the time he applied for title and registration. Taxpayer Ex. No. 4

Conclusions of Law:

At the start of the hearing, taxpayer made a motion to dismiss this cause (hereinafter "motion") based upon his averment that the NTL at issue was mailed to Doe at his Illinois address of Anywhere, Illinois, and not to his residence in Arizona. Thus, the "notice was not provided to him in an adequate and proper fashion." Further, he proposes, the Mercedes was purchased by Doe in 2003 and the Department did not issue the NTL until December 2006. In addition, because the notice was sent three years after the time of purchase, Doe is no longer able to collect a refund from Arizona for the tax he paid in that state based upon the purchase price of the motor vehicle. Tr. pp. 5-7. Taxpayer's motion is denied for the reasons that follow.

Pursuant to Article X of the Illinois Vehicle Code, 625 **ILCS** 5/1-100 et seq. (hereinafter the "Code"), a Vehicle Use Tax is imposed "on the privilege of using, in this State, any motor vehicle …acquired by gift, transfer, or purchase". 625 **ILCS** 5/3-1001. The Code incorporates (id. at 5/3-1003), for purposes including our considerations here, provisions of the Illinois Use Tax Act, 35 **ILCS** 105/1 et seq. (hereinafter the "UTA"). The UTA incorporates (id. at 105/12), for pertinent purposes, provisions of the Illinois Retailers' Occupation Tax Act, 35 **ILCS** 120/1 et seq. (hereinafter the "ROT" or "ROTA"). It is the ROTA that directs that "[W]henever notice is required by this Act, such notice may be given by United States registered or certified mail, addressed to the person concerned at his last known address… ." Id. at 120/12.

The Department correctly argues that it properly sent the NTL to Doe at the address in Illinois. Doe filed both a federal 1040 income tax return and an Illinois IL-

1040 income tax return in the years 2004 and 2005 affirmatively advising on each return that his address was Anywhere, Illinois. Department Exs. No. 4, 6. In none of these documents does Doe refer to or otherwise indicate that he and his wife were not residents of Illinois despite the availability on the Illinois return to affirmative declare that they were either non-residents or part-year residents of Illinois. Department Exs. No. 4, 6 (2004 IL-1040 line 14 declaration of net income for "Nonresidents and part-year residents only", 2005 IL-1040 line 14 declaration of net income for "Nonresidents and part-year residents only"). In fact, Doe specifically declared his net income on that part of those returns marked "Residents only". Doe's signatures on these 2004 and 2005 income tax returns are immediately below the following statement: "Under penalties of perjury, I state that I have examined this return and, to the best of my knowledge, it is true, correct, and complete." Id.

While he provides that his state income tax return for 2006 was filed with Arizona as a resident of Arizona (Department Ex. No. 3)[1], that return would not have been due to be filed, in Arizona and not Illinois, until after the issuance of the NTL which was in December, 2006. In contrast, Doe's 2004 Illinois income tax return is signed by Doe and his wife, and is dated April 7, 2005 by Doe and April 10, 2005 by his wife. His 2005 Illinois income tax return is signed by Doe and his wife and is dated April 3, 2006 by him and April 10, 2006 by her. In addition, his employer at these times issued Doe IRS Form W-2 Wage & Tax Statements providing that Doe's address was on in Illinois. Department Exs. No. 4, 6. Certainly, then, his employer

[1] This exhibit is unsigned and undated. Doe testified that it was his return. Tr. p. 44.

considered this as his address to which important personal legal documents should be sent and would be timely received.

Therefore, at the time the Department issued the NTL in December, 2006, it had, as its record for Doe, that he was an Illinois resident residing at Illinois. Consequently, as the Department's last known address of Doe was in Illinois, the NTL was, statutorily, properly sent and his motion to dismiss on the grounds of improper service is without legal merit.

With regard to the timeliness of the NTL, the ROTA establishes statutory parameters for the issuance of a notice of tax liability such as the one at issue. The Mercedes was purchased on July 21, 2003. Department Ex. No. 2 (ST-556 Sales Tax Transaction Return). Pursuant to these provisions, the Department was required to issue the NTL no later than December 31, 2006. 35 **ILCS** 120/4, 120/5. The NTL was issued December 5, 2006, and, therefore, was timely for statutory limitations purposes. Further, the fact that it is too late for Doe to receive a refund from Arizona for the monies he paid to it is not relevant to whether this NTL was properly and timely issued. Certainly, Doe did not provide any legal authority as a basis for this averment. As a result, Doe has failed to provide any sound legal premise for dismissing the NTL on procedural grounds.

On the merits taxpayer defends against the NTL averring that at the time of his purchase of the motor vehicle he was a resident of Arizona. He avers that he purchased the Mercedes for his wife, Jane (tr. pp. 32, 34),[2] and drove it from Illinois as soon as it was delivered to him by the retailer. Tr. p. 34. He argues, inter alia, that it was his intent at the time of purchase to be a resident of Arizona and not Illinois. The Department

[2] Jane Doe is a purchaser and owner of the Mercedes along with John Doe. Department Ex. No. 2, Taxpayer Exs. No. 2, 4, 5. She was not at the hearing.

argues that Doe was a resident of Illinois at the time of the purchase and indicia of this are the facts that he had and has continued to maintain an Illinois driver's license and Doe's 2003, 2004 and 2005 IL-1040 showed that he and his wife were residents of Illinois during those years.

The issue of whether taxpayer was a resident of Illinois or Arizona at the time of the purchase of the motor vehicle is important because Doe premises his claim of exemption to the tax on § 3-55(h) of the UTA, which provides:

> 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this State under the following circumstances:
>
> xxx
>
> h) Except as provided in subsection (h-1), the use, in this State , of a motor vehicle that was sold in this State to a nonresident, even though the motor vehicle is delivered to the nonresident in this State, if the motor vehicle is not to be titled in this State, and if a drive-away permit is issued to the motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code or if the nonresident purchaser has vehicle registration plates to transfer to the motor vehicle upon returning to his or her home state. The issuance of the drive-away permit or having the out-of-state registration plates to be transferred shall be prima facie evidence that the motor vehicle will not be titled in this State.

35 **ILCS** 105/3-55(h). Thus, if it is determined that Doe was a resident of Arizona at the time of this purchase, there may not be a tax due to Illinois.

An analysis of the facts and law in this matter are governed by well-settled legal premises. In Illinois, tax exemption provisions are strictly construed against the taxpayer and in favor of the taxing body (Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305 (1976)) with the exemption claimant having to clearly and conclusively prove entitlement to the exemption (id. at 310) with all doubts being resolved in favor of taxation. Follett's Illinois Book & Supply Store, Inc. v. Isaacs, 27 Ill. 2d 600 (1963).

It is first observed that the Illinois Vehicle Code defines "resident", in pertinent part, as "[E]very natural person who resides in this state shall be deemed a resident of this State." 625 **ILCS** 5/1-173. The Use Tax Act does not define "resident". The appellate court, in the case of Hatcher v. Anders, 117 Ill. App. 3d 236 (2nd Dist. 1983), discussed the meaning of the term "resident" for purposes of the Code. The court determined that the term "resident" is synonymous with "domicile". Id. at 239. Further, the court provided that:

> [A] person can have only one domicile or permanent residence and once it is established it is retained until a new domicile is acquired. (citations omitted). Affirmative acts must be proved to sustain the abandonment of an Illinois residence and a temporary absence from the state, no matter how protracted, does not equate with abandonment. (citations omitted). To establish a new domicile, a person must physically go to a new home and live there with the intention of making it his permanent home. (citations omitted). Only when abandonment has been proven is residency lost. (citations omitted).

Id. Intent is a critical question in determining residency. Connelly by Connelly v. Gibbs, 112 Ill. App. 3d 257 (1st Dist. 1983).

Doe has failed to provide legally sufficient evidence that allows a conclusion that he was not a resident of Illinois at the time of the purchase. As a reminder, Illinois law demands "affirmative acts" to be proven to "sustain the abandonment of an Illinois residence and a temporary absence from the state, no matter how protracted, does not equate to abandonment." Hatcher v. Anders, supra at 239. "Only when abandonment has been proven is residency lost." Id.

There is no question that for the years 2004 and 2005, Doe affirmatively represented for legal purposes, under penalty of perjury, that he was an Illinois resident. Whereas the Department provided his 2004 and 2005 Federal and Illinois tax returns as

evidence of this,[3] the Department was unable to provide either Doe's 2003 Illinois or Federal income tax return.[4]

Nonetheless, while the Department could not produce either of these documents, Doe offered nothing that allows for a conclusion that his 2003 income tax returns did not affirmatively report that he was an Illinois resident in that year, just as he had reported for tax years 2004 and 2005. Premised on consistent law in Illinois, the failure by Doe to provide evidence that in 2003 he did not make substantive representations on income tax returns that he was not an Illinois resident is of serious consequence to his claim that he was a resident of Arizona in that year.

The Notice of Tax Liability issued in this cause is prima facie evidence of the correctness of the liability due. 35 **ILCS** 105/5-12 (incorporating 35 **ILCS** 120/4, 120/5); Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978). After the Department establishes its prima facie case, the burden shifts to the taxpayer to overcome it (id. at 15) and the taxpayer must overcome its burden with competent evidence, identified with its books and records. Id.; Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). It is not enough that the taxpayer gives testimony regarding its entitlement to any exemption (Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296 (1st Dist. 1981)) as "exemptions are privileges created by statute as a matter of legislative

[3] Department's counsel stated that Doe's 2004 and 2005 income tax returns were offered into evidence under the Certificate of the Director of the Illinois Department of Revenue. Department Exs. No. 4, 6. No such Certificates were submitted with those documents. The admission into the record of these documents is appropriate, however, as Doe testified that these income tax returns were his. Tr. pp. 57-58.

[4] The Department attempted to admit the fact that Doe's 2003 Illinois income tax reported his state of residency as Illinois through the affidavit of Laura Lee Teer, the Manager-Records Management Division of the Illinois Department of Revenue. Department Ex. No. 5. Ms. Teer did not appear at the hearing. In her affidavit she states that Doe's 2003 income tax "return was destroyed pursuant to the Department's record retention schedule" however, the Department's microfilm records of that return exists and was attached, under the certificate of the Director of the Illinois Department of Revenue, as an exhibit to her affidavit. Id. at ¶ 6. No such record was attached to Department Ex. No. 6, with or without a Certificate, therefore, her statements regarding this information are not considered as part of this recommendation.

grace" and such statutes are to be strictly construed in favor of taxation." (internal citations omitted) Id. at 295.

This taxpayer offered little documentary evidence to support his position that he was an Arizona resident during 2003. In fact, the only documents provided in this regard are the ST-556 Sales Tax Transaction Return (Department Ex. No. 2) and the Motor Werks Vehicle Buyer's Order (Taxpayer Ex. No. 2) that show an Arizona address for him. However, there is no evidentiary support for these documents that allows for any conclusion that these are competent representations of legal residency, as opposed to being listings of an address in Arizona that Doe asked the retailer to place on these forms. Therefore, no value can be placed on these documents on the issue of Doe's legal residency in 2003.

Similarly, a copy of his wife's driver's license from Arizona for 2003 is also not persuasive on the issue of Doe's legal residency. Although she held an Arizona driver's license in that year, Doe concedes that he did not. Tr. p. 27. Further, his wife signed the 2004 and 2005 income tax returns affirmatively averring that she was an Illinois resident. Mrs. Doe did not appear at the hearing. Therefore, this evidence that pertains to her is, at best, contradictory, and falls far short of clearly and convincingly establishing that Mrs. Doe's legal residency in 2003 was in Arizona, let alone establishing the state of his residency.

Therefore, applying the fundamental legal premises that control tax assessments and claims of exemption related thereto, Doe has failed to establish, clearly and convincingly, that he was not a legal resident of Illinois in 2003 when he purchased the Mercedes. He has failed to rebut the prima facie correctness of the NTL at issue.

Aside from the failure to establish that he was a nonresident of Illinois when he purchased the Mercedes, another requirement of the exemption statute was not satisfied. Section 3-55 of the UTA exempts from tax a motor vehicle sold to nonresident but delivered to him in Illinois "if a drive-away permit is issued to the motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code or if the nonresident purchaser has vehicle registration plates to transfer to the motor vehicle upon returning to his or her home state. The issuance of the drive-away permit or having the out-of-state registration plates to the transferred shall be prima facie evidence that the motor vehicle will not be titled in this State." 35 **ILCS** 105/3-55(h).

Section 3-603 of the Code specifically provides for the issuance of a driveaway decal permit when a dealer sells a motor vehicle to a nonresident who does not, at the time the motor vehicle is delivered to the buyer, have out-of-state registration license plates to transfer to it. The purpose of this specific permit is to allow for the "operation of such vehicle without registration from the place of sale to the place of destination outside of the State of Illinois… ." 625 **ILCS** 5/3-603(a). Further, "[A]ny vehicle being operated pursuant to a driveaway decal permit may not be used for any other purpose and such permits shall be effective only for a period of 10 days from the date of sale." Id.[5] These decals are to be "firmly attached to the inside windshield of the motor vehicle in such a manner that it cannot be removed without being destroyed." Id. at 5/3-413(c).

[5] Pertinent dates in this matter are unclear, at the very least. The sales tax transaction return that was filed with the Department acknowledging the sale of the Mercedes to Doe is signed and dated by Doe, his wife and the dealer on July 21, 2003. Department Ex. No. 2. The "date of delivery" of the Mercedes is shown as July 21, 2003. Id., line 3. The "Vehicle Buyer's Order" for the same car is dated and signed by both Does on September 21, 2003. Taxpayer Ex. No. 2. Finally, the temporary registration plates were issued on October 2, 2003. Taxpayer Ex. No. 3. Doe's explanation for the two month delay between the apparent purchase of the motor vehicle in July and his taking actual possession of it in September, is that he did not need to use it while he was in Chicago. Tr. pp. 33-34.

In this matter, Doe did not have Arizona vehicle registration plates at the time of his purchase, and, the Illinois dealer did not issue him a driveaway permit as especially provided for by statute. Rather, the dealer caused to be issued to Doe a temporary registration plate for the Mercedes which was to be removed from its location "at plate area on the rear" of the motor vehicle after receipt of the permanent license plates. Taxpayer Ex. No. 3. The issuance date of the plate is shown to be October 2, 2003 with an expiration date of 12/31/2003.

This temporary registration plate is markedly different, statutorily, from the driveaway permit that is distinctly required in the exemption provision. The purpose of the temporary plate is to allow for the operation of a motor vehicle that is subject to registration in Illinois, i.e. to an Illinois resident, until such time as the registration process is completed. 625 **ILCS** 5/3-407. In this case, the temporary plate issued to Doe was valid for almost three months. In contrast, the driveaway permit is a decal that allows for the operation of a motor vehicle in Illinois that is not to be registered in Illinois, i.e. sold to a non-resident, but is delivered in Illinois. The sole purpose of the operation of the motor vehicle operating with a driveaway permit is to drive it from Illinois to a destination state, thus, it is legally valid for only a matter of days.

It cannot be ascertained from this record why the retailer issued Doe a temporary registration plate rather than a driveaway permit. Perhaps it has something to do with discussions had in July when Doe bought the motor vehicle from the retailer. No one from the retailer familiar with the transaction appeared to testify on Doe's behalf. Regardless, for whatever reason, the retailer did not issue the statutorily required driveaway permit to Doe. Thus, this transaction does not satisfy the mandates of one that

would allow exemption from the imposition of Illinois use tax, as tax exemption provisions are strictly construed against the taxpayer and in favor of the taxing body. Telco Leasing, Inc. v. Allphin, supra; Balla v. Department of Revenue, supra. The exemption provision was not complied with and there was no credible clear evidence provided as to why this occurred. Therefore, the prima facie correctness of the NTL was not rebutted with the result being that the Department correctly assessed the use tax on this transaction.

Doe also argues that if the tax is found to be properly assessed, he should be allowed a credit toward this Illinois liability based upon his payment of taxes in Arizona at the time he registered the Mercedes there in October, 2003. This argument is presumably based upon the line item on the Title And Registration Application for "DOR" $2990.46. Compare Department Ex. No. 1 (NTL tax $3,338.00) with Taxpayer Ex. No. 4. The taxpayer offered no statutory or case law support for his proposition regarding his right to a credit. To this argument, the Department states the tax was properly owed to Illinois and not to Arizona, and no credit provision applies.

There is no provision that I am aware of that allows for a credit to be granted in a case such as this, that is, when an Illinois resident purchases and has delivered to him in Illinois a motor vehicle that he subsequently has titled in Arizona. In such a case, the payment of the use tax is properly made to Illinois. Since the "right to a refund or credit can arise only from the acts of the legislature" (Jones v. Department of Revenue, 60 Ill. App. 3d 886, 889 (1st Dist. 1978)), unless there is an authorizing statutory provision allowing for a credit for any use tax Doe may have paid for this car to Arizona, none can be allowed.

WHEREFORE, for the reasons stated above, it is recommended that Notice of Tax Liability number 00 0000000000000 be finalized as issued.

1/8/08

Mimi Brin
Administrative Law Judge